85-925

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THEODORE D. CHRISTENSEN,

Petitioner

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether a jury in an employment discrimination case is entitled to ignore or disbelieve an employer's stated motive when the plaintiff has shown a *prima facie* case of discrimination.

Whether the decision of the Seventh Circuit contravenes decisions of the Supreme Court which permit a plaintiff to prove employment discrimination without presenting a rebuttal case.

Whether the decision in this case demonstrates a split in the circuits on the plaintiff's burden of proving employment discrimination to a jury.

Whether or not an employer's affirmative action program can be presented to a jury as evidence of a motivation for impermissible discrimination against an employee.

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CITATIONS TO OPINIONS BELOW

The opinion of the Seventh Circuit (printed in Appendix A hereto, infra, pp. A-1 - 6) is recorded at 767 F.2d 340 (1985), 38 FEP 692. The judgment of the trial court (See Appendix B) was not recorded in any official or unofficial report.

JURISDICTION

The decision of the Seventh Circuit Court of Appeals was entered on July 10, 1985. A Petition for Rehearing and Suggestion of Rehearing En Banc was timely filed, and it was denied by Order dated August 29, 1985. This Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 62 *Stat.* 298 (28 U.S.C. 1254(1)).

FEDERAL STATUTES INVOLVED

The statutory provisions involved are:

R.S. §1977 (42 U.S.C. §1981) which reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 4 of the Age Discrimination in Employment Act of 1967, 81 Stat. 603 (29 U.S.C. §623(1)), which reads as follows:

> §623 — Prohibition of Age Discrimination
> (a) Employer practices. It shall be unlawful for an employer—
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age....

STATEMENT OF THE CASE

THE BASIS OF FEDERAL JURISDICTION —

The District Court had original jurisdiction of this action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343.

FACTS OF CASE –

This case concerned the effort of Theodore D. Christensen, a 52 year old white male, to obtain redress for his discharge from employment by The Equitable and his replacement by a young black individual.

Petitioner's Complaint for age and race discrimination was filed in the United States District Court for the Southern District of Indiana on August 31, 1982. Trial was held on December 5-7, 1983, and the jury returned a verdict for Petitioner on both age and race counts on December 7, 1983; on same date the Clerk entered judgment on Count I in the sum of $62,000 in lost wages, plus loss of benefits to be determined at a later date; as to Count II, the Clerk entered judgment on the jury verdict for $300,000 for compensatory damages and $700,000 for punitive damages.

After oral argument on defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, the Court on January 13, 1984 entered judgment on Count I for $62,000 in lost wages, plus enumerated joint and survivor pension benefits. As to Count II, the District Court entered an Order that Plaintiff agree to a remittitur of the compensatory damages to $75,000 and of the punitive damages to $125,000, else a new trial would be granted on Count II. Plaintiff agreed to the remittitur by Stipulation filed March 28, 1984. Defendant appealed from both rulings.

Evidence introduced at the trial revealed that plaintiff was first employed by the Equitable in July, 1955. Thereafter, he excelled through the ranks of its Realty Operations Division until he reached Division Manager in the Indianapolis office, in 1966. As Division Manager, Christensen negotiated loans, serviced loans, collected troubled loans, solicited new business, reviewed salary annually for office personnel, supervised personnel activities including the training of new employees, and

handled employee benefits. In Indianapolis, he could loan $3,000,000 of Equitable money without any prior approval from the home office in New York.

Although Christensen's superior, Robert Kist, described Christensen in 1980 as an "average Division Manager", he admitted that Christensen's Division had just come off of a very good year in 1979. He also admitted that he had not had, at least since 1975, the annual formal job discussion with Christensen which was required by the personnel policies, in which he was to discuss any faults or shortcomings in Christensen's performance. In fact, plaintiff was never advised prior to 1980 of any alleged insufficiencies in his performance. There were discussions only about perhaps five problem loans which turned out to be properly secured.

Christensen had no knowledge of defendant's intention to replace him until he was advised by Kist on June 30, 1980. Kist would only tell Christensen, then age 52, that the Company had found somebody "better" for the job; he did not tell Christensen that the "somebody" was a black male under the age of 40. He advised plaintiff that the Company wished to transfer him to Chicago only as an Associate Division Manager, without any assurances regarding his future with the Company or regarding any pay increase to offset higher living costs in Chicago. Kist erroneously advised Christensen that if he decided not to take the transfer, he would receive severance benefits amounting to 40 weeks of full pay and 62 weeks of half pay. Kist never specified for Christensen any performance-related reasons for his removal from Indianapolis; he merely urged Christensen to take the transfer to preserve his retirement benefits.

Kist admitted that his confusion over the benefits payable to Christensen upon termination arose from the fact that this was such an unusual event that the Company's personnel policies did not even explain how to treat an employee who refused a transfer. Kist had never

terminated an employee for refusing to transfer, despite employees having so-refused in the past. Christensen upon termination was to be, and in fact was, treated, for purposes of severance pay and benefits under the personnel policies, as an unsatisfactory employee.

Kist admitted that he had not conducted a formal job discussion with Christensen since at least 1975, despite several company memoranda mandating such discussions with underlings; however, he claimed that he had talked to Christensen informally on occasion regarding a few alleged shortcomings, apparently having mostly to do with his relationship with certain clients. On cross-examination he could name only two such clients, and he admitted that their preference for dealing with him may have had more to do with his previous tenure in Indianapolis, and thus familiarity with them, than because of any dislike for the plaintiff.

While conceding that in 1979 Christensen had performed "very well", Kist claimed that he had felt for years that Christensen was in the wrong job. Nothing occurred in 1980 to cause Kist to replace plaintiff, except that he had in mind a successor, Robert Thurman, a 37 year old black employee of The Equitable in Minneapolis. Thurman was to be the first black Division Manager in Equitable's Realty Operations Division. At the time Kist made this decision, he was well aware of Equitable's affirmative action program.

Mr. Kist and John Beck, the Company's personnel officer in Realty Operations, both testified that Christensen received lower than average wage increases during his tenure as Division Manager in Indianapolis; however, they both admitted that plaintiff had no way of knowing what were the salary increases or salary levels of his peers, as such information was available only to the highest executives. Beck also admitted that there was no Company policy mandating the termination of an employee who refused to transfer; in fact, Supervisory Guide 10.3 did not denote refusal to transfer as a reason for termination.

The jury also considered several documents which related to defendant's Affirmative Action Program. These exhibits demonstrated a firm commitment to affirmative action goals and their attainment, the hiring of minorities in specific offices, the determination to place minorities into executive and managerial positions, and a freeze on hiring all but minorities.

Christensen was terminated with the concurrence of higher Company officials, when he refused to accept transfer to Chicago. Witnesses for The Equitable testified that Christensen was replaced because they had found somebody who could do the job "better", that the replacement was in fact "above average" in ability and thus was superior to Christensen. In support of Kist's testimony that he had been a "weak" division manager, defendant adduced one confidential memorandum regarding a pay raise for plaintiff in 1977.

Based upon its own evaluation of the evidence, the Seventh Circuit Court of Appeals held that plaintiff indeed had been constructively discharged when he refused to transfer to Chicago; it also held that he had established a *prima facie* case of age and race discrimination. However, contrary to the jury verdict and lower court judgment, the court found that plaintiff had not carried his burden of successfully rebutting the legitimate reasons advanced by the company for his termination. As to the race count, the court, without citing precedent, held that an employer's affirmative action program could not be used as evidence of racial discrimination, and held that plaintiff had made no other showing of discriminatory intent. As to the age count, the court held that the fact that plaintiff's pension would be drastically affected by his termination did not, in the absence of statistical evidence showing termination of other older employees in order to save on pension costs, establish a case of age discrimination. Thus, it reversed the district court on both counts of the Complaint and ordered that judgment be entered for defendant on both counts.

ARGUMENT FOR GRANTING THE PETITION

The Court must grant this Petition to consider again the issues of proof, burden of proof and the standard of review which are appropriate in cases of employment discrimination. While the Court has spoken before on at least two of these issues, it is apparent from a review not only of the case at issue but of other case law from other circuits, that the appellate courts are all grappling, mostly unsuccessfully, with the burden of proof problem. Their problems in this area have led to standards of review of the evidence which conflict not only with each other but also with prior rulings of this Court, and have deprived, and are depriving, victims of employment discrimination of substantial rights under the law; in fact, because of these decisions, it can now be fairly stated that an individual's right to be free from employment discrimination is now largely dependent on the circuit in which he resides. This has not been the intention of Congress or of the Court.

Yet it is obvious from a review of such cases as *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 799 (11th Cir. 1985) and *EEOC v. University of Oklahoma*, ___ F.2d ___, 38 FEP 1751 (10th Cir. 1985), and a comparison of them with case law from the Seventh Circuit, that there is a split among circuits in the treatment of these cases, and an infidelity to the holdings of this Court, that cry out for redress.

I. THE LOWER COURT FAILED TO FOLLOW THE HOLDINGS OF THIS COURT

This Court has set forth the essential elements of a successful action for employment discrimination in three leading cases: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Their cumulative effect has been to lift from an employer the burden of proving a non-discriminatory motive for an

adverse action against an employee, while freeing both sides from the burden of producing their evidence in the rigid, mechanical fashion that the appellate courts mistakenly believed was required by *McDonnell Douglas*.[1] The results of these opinions would seem to be fair to both sides, but in reality several courts of appeal, including the Seventh Circuit, continue to apply mechanistic rules to the evaluation of evidence. Employers, meanwhile, freed of any requirement that they support their employment decisions with facts, are resorting to increasingly subjective justifications which the appellate courts regard unquestioningly or as unquestionable. The decisions of this Court, however, mandate that the appellate courts should let the finder of fact resolve the validity of, and weight to be accorded to, the assertion of subjective factors in employment decisions; the case at that point has reached the "new level of specificity" wherein motive becomes an issue for submission to the fact-finder.

In *McDonnell Douglas Corp., supra*, the Court reversed a holding that an employment decision based on "subjective" criteria did not constitute significant rebuttal evidence. The Court held that the stated reason, that plaintiff had participated previously in unlawful activity against it, was valid and effectively rebutted the *prima facie* case of plaintiff. However, the Court observed, whether that was the true reason for the company's refusal to hire plaintiff, was itself open to attack from plaintiff, and cited examples of proof which would show pretext. In short, plaintiff was to be allowed to show by competent evidence, if he could, that the stated reason for the action was likely not the real reason for the refusal to hire, and that a discriminatory reason was more likely.

The Court further refined its views on the proof of employment discrimination in *Texas Department of Community Affairs v. Burdine, supra*, in which it

[1] To paraphrase justice Rhenquist, Who cares how we get to the ultimate issue, as long as we get there! See Aikens at pp. 714-15.

overturned a Fifth Circuit ruling that an employer must prove by a "preponderance of the evidence" the existence of legitimate reasons for the employment action and also that an employer must present "objective" evidence to support its contention that one job applicant would be better than another. While the Court again reviewed the necessary elements of a *prima facie* case for plaintiff and the nature of the burden which then shifted to the defendant, it emphasized that the plaintiff at all times "retains the burden of persuasion." 450 U.S. at 256. Because of this ultimate burden on the plaintiff, it really makes no difference whether or not the employer actually proves that a stated reason for its action was the actual reason; it need only state a legally sufficient reason. The stated reason, whether or not actual, raises the inquiry to the "new level of specificity" where questions of motivation become issues of fact for resolution by the fact-finder.

The plaintiff may prevail, either by attacking directly the stated reason or by showing through indirect evidence that the professed reason was indeed not the true reason, that it is "unworthy of credence." *Ibid.* The Court emphasized that such proof did not need to follow any set pattern. For example, "there may be some cases where plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." 450 U.S. at 255 n.10. Thus, the plaintiff's direct case, and its proof on defendant's case, could provide the seeds of its "rebuttal" to defendant's stated reason.[2] The Seventh Circuit ignored this clear language.

A critical element to the Fifth Circuit's ruling that there had to be some substance to the employer's proof was its concern that an employer could "compose fictitious, but legitimate reasons for his actions." The Court's response to

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[2] See *Lindsey v. American Cast Iron Pipe Co.*, *supra*, fn.1: a plaintiff can successfully refute an articulated reason by direct, redirect and cross-examination without the need for "rebuttal" evidence.

the Fifth Circuit's fears in this regard is insightful as well as logical, but it appears that the Seventh Circuit as well as other appellate courts have failed to read and understand it:

> First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. [citations omitted]. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the *prima facie* case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation... Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. 450 U.S. at 258.

This passage clearly shows that the Court did not intend for an employer's explanation to be accorded unquestioning belief. Obviously subjective factors must even more skeptically be scrutinized than one which an employer could show objectively. However, the appellate courts, and now the trial courts, are increasingly resistant to plaintiffs' efforts to demonstrate, by other than direct evidence, the pretextual nature of subjective reasoning. This trend, which is contrary to the decisions of this Court, makes it extremely difficult for individual plaintiffs to prevail in employment discrimination cases.[3]

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[3] Indeed, the opinion in this case demonstrates the Seventh Circuit's hostility toward individual employment discrimination claimants. The court, without more, overturned Petitioner's jury verdict on his age count because he did not show that Equitable had a policy of terminating older employees in order to save on pension costs. There was no dispute that defendant recognized a considerable savings by terminating Petitioner when it did.

In *U. S. Postal Service Board of Governors v. Aikens*, *supra*, the Court reiterated its holding that to prevail in an employment discrimination case, the plaintiff need not adduce direct proof of discrimination. Rather than focus on whether or not plaintiff had made out a *prima facie* case of discrimination, a trial court should be more concerned with the ultimate issue of whether the facts adduced by the parties reasonably show an intent by the employer to discriminate against the plaintiff. *Ibid* at p. 715. The Court observed that determining an employer's motivation from mental processes is a difficult but necessary task in employment discrimination; ascertaining motivation should not, however, become mired in an effort to determine who met what burden.

The Seventh Circuit's preoccupation with "applying legal rules which are devised to govern 'the basic allocation of burdens and order of presentation of proof' in deciding this ultimate question [of motivation]" [citations omitted], 460 U.S. at 716, is nowhere more evident than in the instant case. The court of appeal's evaluation of Petitioner's race discrimination claim evidences its failure to understand the ultimate burden of proof which was borne, successfully, by Petitioner in the trial court. The court's preoccupation with Petitioner's alleged failure to produce "rebuttal evidence" to the valid non-discriminatory reason offered by Equitable for its action against Petitioner apparently prevented it from noting the substantial evidence which the jury believed and the lower court upheld. Kist asserted that he, and he alone, made the decision to replace Petitioner with someone who he, subjectively, believed could "do a better job". However, he admitted that Petitioner had served in the position for 14 years without adverse review, was in fact performing satisfactorily at the time of his replacement, had performed very well the previous year, and had given Kist no particular reason to replace him in 1980 except that he was white and growing

older. Kist admitted receiving several directives from his superiors regarding the employment of minorities.[4]

Kist rested his entire critique of Petitioner's performance on subjective, mental processes which, as presented, were unreviewable. The only way in which Petitioner could attack the stated reasons for his termination as set forth by the Respondent was to show satisfactory job performance and the unlikelihood, unless for prohibited motives, that Respondent would treat him the way that it treated him. For Petitioner, it was a matter of putting his work record and company policy up against the subjective, unwritten evaluations of him proffered by his long-time superior. How else can one refute the opinion of a superior that another would 'do better' than he in a job which the replacement had never performed, than by submitting evidence concerning the totality of the circumstances under which the change was made? The very same evidence which established, if you will, Petitioner's *prima facie* case, also was part of the cumulative evidence by which he met his ultimate burden of persuasion. In the face of the unlikely explanation for his treatment which was presented by defendant, what more need or can he do? The jury obviously believed Christensen's evidence, to the tune of several hundreds of thousands of dollars.

The jury, after a three day trial during which there were no irregularities, and after being properly instructed by the court, believed Petitioner and totally disbelieved Respondent. The trial court, after due consideration of the evidence, upheld the verdict on age discrimination in total and upheld the verdict on the race count as modified. The six member jury whose foreman was black, and a veteran and distinguished trial judge heard, saw and studied

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[4] Petitioner was advised at the time of his discharge that he was being terminated because he refused to accept an unsatisfactory transfer to Chicago. The Court of Appeals found the treatment of Petitioner by Equitable to constitute a constructive discharge. See 767 F.2d at 343.

Equitable's witnesses — and found against Equitable. Then, the Seventh Circuit, looking only at the dullness of printed word, decided this employee was unworthy of credibility. The court of appeals looked at the evidence, put its own slant on it, and decided that the judge and jury had been wrong merely because Petitioner had not successfully rebutted Respondent's proffered reason.[5] The Court ignored the fact that Christensen, having established a *prima facie* case of discrimination, need not introduce any further evidence. He may let the jury decide who it believes.

Aggravating its errors, however, the court of appeals accepted that subjective determinations of employee performance, unbuttressed by objective evidence, are fairly impregnable to attack on credibility grounds. See 767 F.2d at 343. The enunciation of subjective considerations in employment discrimination cases has achieved more prominence with the elimination of any burden on the employer to prove its reasons, but the failure or inability of an employer to provide a factual basis for its subjective decision should render that decision more, not less, vulnerable to disbelief by the fact finder. The court of appeals, however, considers subjective evaluations not only necessary in making management decisions, but also immune from evaluation by the fact finder. This mind set in fact finds increasing acceptance in the circuit, even in the face of objective facts which could establish the

[5] The Court of Appeal's assessment of Respondent's evidence reads like an argument for the defense. Thus it deemed an employee who had held the same position for 14 years to be "marginally qualified" for such position and his prospective replacement as "far better qualified"; neither conclusion is supported by the record. One "confidential evaluation" made in 1977 became a valid basis for action against him in 1980; apparently the jury was not privileged to disbelieve a three year old evaluation as the basis for action against a long-time employee. 767 F.2d at 343.

pretextual nature of the subjective reasoning and in the face of the rule of law of other circuits.[6]

II. THE LOWER COURT'S DECISION CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS AND APPLIED AN INCORRECT STANDARD OF REVIEW

The defects in the appellate court's decision herein lie not only in its failure properly to evaluate *all* evidence adduced at trial, but also in its failure correctly to apply a reasonable standard for reviewing jury verdicts in employment discrimination cases.

The errors committed by the court of appeals in its evaluation of the evidence, and the conflict between it and other circuits with regard to evaluation of such evidence, are nowhere more apparent than in a comparison of this case with *EEOC v. University of Oklahoma*, ___ F.2d ___, 38 FEP 1751 (10th Cir. 1985); there, the court properly evaluated all of the evidence, including inferences to be drawn therefrom, under a more limited standard of review and came to the conclusion that the trial court had erred in granting a motion for judgment notwithstanding verdict. The standard which that court applied: "only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made' is j. n. o. v. appropriate ... the trial court cannot deprive a non-moving party of a jury determination unless it is certain that the evidence 'conclusively favors one party such that reasonable men could not arrive at a contrary verdict.'" [citations omitted]. 38 FEP at 1752. On this standard, the court found that the trial court had

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[6] See *LaMontagne v. American Convenience Products*, 750 F.2d 1405 (7th Cir. 1984), *Tice v. Lampert Yards*, 761 F.2d 210 (7th Cir. 1985), and *Namenwirth v. Board of Regents, University of Wisconsin*, 769 F.2d 1235 (7th Cir. 1985) (See dissent of Judge Swygert).

> "reweighed the evidence and factored in its view of the credibility of the witnesses. While much of the evidence was circumstantial, all of the evidence and any inferences logically flowing therefrom, must be examined to determine whether the jury's verdict was a reasonable conclusion and not an irrational speculation. Although the evidence is far from conclusive, we believe it is sufficient to support the jury's verdict." *Ibid.*

The court of appeals then examined evidence, including an analysis of cross-examination of witnesses for the defendant. It found that the case for the plaintiff was built largely on circumstantial evidence which gave rise to permissible inferences that other factors besides the stated one were responsible for the employment action. It concluded:

> While all of the evidence was disputed, and while no direct proof of age discrimination was produced, taken as a whole the evidence cumulatively supports the reasonable inference of discrimination. In any event, the evidence had reached that "new level of specificity" requiring the court to submit the issue of motivation to the fact finder... The trial court erred in substituting its perception of the evidence for that of the jury. 38 FEP at 1754.

It was also error for the Seventh Circuit to substitute its "perception" of the evidence in this case.

The high regard and deference with which the Tenth Circuit treated the jury's determination in *EEOC v. The University of Oklahoma* is certainly a great contrast to the short shrift accorded to jury verdicts in employment discrimination cases in the Seventh Circuit. A comparison of case law in the two circuits indicates that the differences are based not only upon application of different standards of review but also upon differing views on the sufficiency of the evidence, when taken as a whole, to sustain a plaintiff's verdict. These differing attitudes and standards when

applied to a consideration of substantive statutory rights of U. S. citizens threatens the uniform enforcement of these rights. The Tenth Circuit would have affirmed Ted Christensen's judgment; the Seventh Circuit threw it out.

The lead cases in the various circuit courts of appeal reveal the disparate standards of review being applied to the review of jury verdicts in employment discrimination cases. Each circuit pays homage to the *McDonnell-Burdine-Aikens* synthesis of burden of proof, but the ways in which they view those burdens are quite different. The Seventh Circuit may be the only one which, under *any* standard of review, has reversed on insufficiency of evidence grounds a trial court's denial of a judgment n.o.v.

The First Circuit in *Cazzola v. Codman and Shurtleff, Inc.*, 751 F.2d 53, 54 (1st Cir. 1984) ruled that a judgment notwithstanding a verdict should be granted "only upon a determination that the evidence could lead reasonable men to but one conclusion, a determination made without evaluating the credibility of witnesses or the weight of the evidence at trial." The inquiry in an age discrimination case "is whether the plaintiff has produced evidence from which a trier of fact might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Although the evidence of discrimination was all circumstantial, the court believed that a verdict in plaintiff's favor "would not be based on 'surmise and conjecture and a mere scintilla of evidence.'" *Ibid* at 55. Ted Christensen's case would have been affirmed in the First Circuit.

In the Court of Appeals for the District of Columbia, a judgment n.o.v "should not be granted unless the evidence, together with all the inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." [citation omitted]. *Coburn v. Pan American World Airways*, 711 F.2d 339, 342 (D.C. Cir. 1983). A j.n.o.v is proper "only if 'there can be but one reasonable conclusion' drawn from the evidence viewed 'in

the light most favorable to the plaintiffs [in this case], giving them the advantage of every fair and reasonable inference that the evidence may justify'". In this case, involving an employer explanation based on a written policy which it followed, the Court found that no reasonable jury could have inferred an illegal motive for the employer's action. Ted Christensen's case would have been affirmed in the District of Columbia.

In *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 82 (2nd Cir. 1983), the Court held that a judgment n.o.v should be entered "only when, viewing the evidence in the light most favorable to the non-moving party '(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded men could not arrive at a verdict against him.'" In a case revolving chiefly around resolution of credibility issues, the court found the evidence not so thin as to create the presumption that the plaintiff's verdict was based on conjecture or surmise. Ted Christensen's case would have been affirmed in the Second Circuit.

In passing on a lower court's grant of judgment n.o.v, the Fifth Circuit Court of Appeals[7] observed that such a motion may be granted:

> 'Only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict .... there must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of fact, and not the court, to weigh conflicting evidence and inferences, and to determine the credibility of

[7] This standard is also applied by the Eleventh Circuit Court of Appeals. See *O'Donnell v. Georgia Osteopathic Hospital*, 748 F.2d 1543 (11th Cir. 1984).

> witnesses.' [citations omitted]. *Bohrer v. Hanes Corp.*, 715 F.2d 213, 217-18 (5th Cir. 1983).

The Court went on to hold that no jury, faced with a record "replete with instances of Bohrer's deliberate violation of both company policies and management directives...." could have found that age was a determinative factor in his discharge. Ted Christensen's case would have been affirmed in the Fifth and Eleventh Circuits.

The Fourth Circuit Court of Appeals, in *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982), engaged in a lengthy examination of the evidentiary burdens shouldered by the parties in an employment discrimination case. After presentation of plaintiff's case in chief, defendant must present a "legitimate, non-discriminatory reason" for its action against plaintiff; if it does so, then plaintiff

> "must be given an opportunity directly to counter the defendant's evidence of the specific reason for the action with evidence that the reason given is 'pretextual' or 'not the true reason.' This may take the form of new evidence designed directly to attack the credibility of the defendant's specific explanation or simply to prove that, as against the specific reason, age is the 'more likely' explanation." 681 F.2d at 240.

If plaintiff carries this burden, then the motivational issue must be submitted to the jury; if he does not, then a motion for judgment n.o.v or for a directed verdict would be appropriate. The standard which the court distilled from an examination of precedent in the circuit for granting of a judgment n.o.v: A case should be submitted to a jury only upon evidence "which shows a 'probability' and not a mere 'possibility'". A case should be withdrawn from the jury "when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Application of the judgment n.o.v is an appropriate "jury control device" in cases involving motivation where a jury decision might

be based upon sheer speculation'. *Ibid.* at 241-42. Thus informed, the Court affirmed a judgment n.o.v where the defendant showed through objective evidence a steady decline in plaintiff's performance. Ted Christensen's judgment would have been affirmed in the Fourth Circuit.

In the Ninth Circuit, the standard for granting a judgment n.o.v, as enunciated in *Jackson v. Shell Oil Co.*, 702 F.2d 197, 200 (9th Cir. 1983) is "whether, when viewing the record as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the non-moving party. Substantial evidence is more than a mere scintilla." [Citation omitted]. Applying that standard the court, while calling the defendant's statistical evidence of non-discrimination "impressive", refused to "second guess" the jury in its comparison of that evidence with conflicting statements of witnesses. *Ibid.* at 201. Ted Christensen's judgment would have been affirmed in the Ninth Circuit.

Which is the proper standard to apply in reviewing jury verdicts in employment discrimination cases? And which court properly applies its enunciated standard of review? Which standard would have permitted a jury, as this Court says it may, to disbelieve defendant's evidence completely and to place full credence on plaintiff's *prima facie* case? It is very difficult from a review of the foregoing, or other cases, to tell. This state of affairs is a manifest injustice to litigants, and especially to those in the Seventh Circuit, where a loose standard of review is being applied not only in the circuit court but in the district courts to overturn proper jury verdicts. The Seventh Circuit is the only circuit that will second guess both a jury and a judge. This is unfair and wrong. What is needed in our federal judicial system, on review of cases brought under our federal employment discrimination laws, is a uniform standard of review, a standard that will adhere to the Court's enunciations in *McDonnell*, *Burdine*, and *Aikens*, and apply those standards in a coherent, predictable manner. Ted

Christensen should not lose his case because he is in the Seventh Circuit, not the Tenth, or Eleventh. There should be one and only one burden of proof nationally and one and only one standard of appellate review in an employment discrimination case.

Such a standard, as this Court reiterated in *Anderson v. City of Bessemer City*, ___ U.S. ___, 84 L.Ed.2d 518 (1985), already applies in the federal system, under Rule 52 of the Federal Rules of Civil Procedure, to bench trials under Title VII of the Civil Rights Act of 1964. That standard, that factual findings of the Court may be overturned only when "clearly erroneous", is a standard which gives proper deference to the trial court's proximity to the case, and, thus, its ability to adjudge such important factors as credibility. It is also a standard under which review of trial court decisions is considerably more limited than that of jury verdicts; in fact, jury verdicts may be reviewed two times under the same standard, once by the trial court and once by the appeals court. What this has meant for litigants in federal civil cases is that they have not only a seventh juror, the trial judge, but also eighth, ninth and tenth jurors, the appellate panel, who despite their denials, increasingly engage in the prohibited activity of re-weighing the evidence.

The effect of this increased judicial intervention alarms even some of our appellate judges. Senior Circuit Judge Luther Swygert, in his dissent from a very recent Seventh Circuit decision, in another context, decried "[A] recent trend in the federal courts to blunt the salutary purpose of Title VII of the Civil Rights Act of 1964." *Box v. A&P Tea Company*, 772 F.2d 1372, 1381-2 (7th Cir. 1985). His comments would apply equally to federal court treatment of other statutes which prohibit employment discrimination.

In view of the improper allocation of the burden of proof in this case, in view of the babel of standards of review being enunciated by the appellate courts, and also in view

of this Court's concern about the improper application of the standard for review of trial court findings in *Anderson v. Bessemer City, supra*, it is an urgent necessity to establish a uniform standard for reviewing the sufficiency of evidence in jury trials of employment discrimination actions. From the number of judgments n.o.v being granted by trial courts, it is obvious that the right to trial by jury of these cases is under severe attack. If Congress had wished for these cases to be decided by the courts, it could easily have eliminated the provision for jury trials in cases of age discrimination and under Section 1981, but it has not done so. It is inappropriate, even in these "sensitive and difficult" discrimination cases[8] for the courts to engage in the wholesale vacation of jury verdicts which is now occurring most notably in the Seventh Circuit. Only this Court can re-establish rationality in this area.

III. AN AFFIRMATIVE ACTION PROGRAM CAN SUPPLY EVIDENCE OF DISCRIMINATORY INTENT

The court of appeals held, apparently as a matter of law, that a plaintiff cannot assert the existence of an affirmative action program as evidence of the discriminatory intent of an employer. This finding is clearly wrong as a matter of law and should be vacated by this Court.

The Petitioner did not, at trial, attack the validity or legality of the Respondent's affirmative action program. Rather, the Respondent showed that the program was being enforced very vigorously by the Respondent, even to the point of establishing quotas in the managerial and professional ranks of the company[9]. Is the court of appeals saying that such a program could *never* be administered in

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[8] *U. S. Postal Service Board of Governors v. Aikens*, 460 U.S. at 416 (1983).

[9] Petitioner's replacement in Indianapolis was the first black manager in Respondent's Realty Operations.

an illegally discriminatory fashion? Does the existence of an affirmative action program completely insulate an employer from charges of illegal discrimination? Or is the likelihood of the employer engaging in such discrimination, in the view of the court of appeals, so remote that the jury could not have found it in this case? If the latter is the case, then the court of appeals clearly substituted its own judgment for that of the jury when considering disputed evidence, and it thus overstepped the bounds of appellate review. If the first two cases obtain, then they are without case precedent.

The court of appeals approached Petitioner's count of race discrimination very skeptically, noting that this was that "unusual case in which the employer discriminates against the majority." Yet it is obvious that reverse race discrimination can be alleged and proven. See *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). If a plaintiff can show through direct or circumstantial evidence giving rise to reasonable inferences that he is the victim of reverse race discrimination, then he should prevail. If the jury in the instant case believed that Petitioner's superior, under pressure from Respondent, replaced Petitioner with a young black male, and that there was no reason to do so other than for the replacement's age or race, then there is no legal reason why the verdict, when supported by sufficient evidence, should not stand. The Court should grant the Petition to resolve this issue.

CONCLUSION

For all of the foregoing reasons, then, and because the decision of the lower court is inconsistent with holdings of this Court and with decisions in other circuits, and because the lower court erred in holding that an employer's affirmative action program can not supply evidence of motivation in an employment discrimination case,

Petitioner prays that the Court grant this Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals to correct these errors.

Respectfully submitted,

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Dated: November 26, 1985.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-1565

THEODORE D. CHRISTENSEN,

Plaintiff-Appellee,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana

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ARGUED APRIL 8, 1985—DECIDED JULY 10, 1985

Before BAUER and POSNER, Circuit Judges and PECK, Senior Circuit Judge.[1]

PECK, Senior Circuit Judge. This is an employment discrimination case. Plaintiff-Appellee Theodore D. Christensen, a white employee of defendant-appellant

[1] Hon. John W. Peck of the Sixth Circuit, sitting by designation.

Equitable Life Assurance Society, was replaced as manager of the company's Indianapolis division by a younger black man. Christensen brought suit in the United States District Court for the Southern District of Indiana, alleging discrimination on the basis of age and race. The jury found for Christensen on both claims. Because we do not believe that the evidence presented, combined with all inferences which may reasonably be drawn from it, when viewed in the light most favorable to Christensen, is sufficient to support the verdict, we reverse.

The evidence adduced at trial established the following facts. In 1980, Christensen was 52 years old and had been working for Equitable for twenty-five years. He had been the company's Division Manager in Indianapolis since 1966. While Christensen was rated as a satisfactory employee, there were some complaints about his competence, particularly in the area of client relations, and his confidential evaluations (which were not shown to him) rated him in the lower range of ability among Equitable employees of his rank. Equitable decided to replace Christensen as Indianapolis Division Manager with a younger black man, whose abilities the company regarded highly.

At the same time, Equitable wished to continue to use Christensen, whom it felt to have particular ability in the training of younger employees. Accordingly, an internal company memorandum discussed creating a new "Associate Division Manager" position for Christensen in the company's Chicago office. The memorandum also stated that if there was insufficient work to justify the position, it would be eliminated. Christensen was offered the position, with no reduction in either his salary or his personnel rank. It was also made clear to Christensen that if he did not accept the transfer, he would be terminated.

Christensen explored the possibility of transferring to Chicago. He decided against the move, however, for two

reasons: the nebulous nature of the position, which made him uncertain what his duties would be and how long he would have the job, and the high cost of real estate in Chicago, which would result in a substantial reduction in his living standard. He also claims to have doubted that the company actually would terminate him for declining the transfer.

Christensen, after declining the transfer, was terminated on January 3, 1981. He filed his suit against Equitable on August 31, 1982, asserting employment discrimination on the basis of race, in violation of 42 U.S.C. §1981, and of age, in violation of 29 U.S.C. §623(a). The case was tried before a jury in December 1983. Evidence submitted by Equitable, consisting of testimony by Christensen's immediate supervisor and another company executive, showed that the company had been concerned about Christensen's job performance for some time. Christensen testified as to the facts surrounding his dismissal, summarized above, and of his replacement by a younger black man. He failed to offer any evidence, statistical or otherwise, demonstrating that Equitable discriminates against whites or that it discriminated against him because he was white. He did offer evidence that Equitable has an affirmative action program, and that it aggressively recruits blacks for management positions. As far as age discrimination is concerned, Christensen established only that his successor was a younger man, and that his early departure from the company had a negative effect upon his pension benefits.

The jury found for Christensen on both claims, and awarded damages of $62,000 on the age discrimination claim. On the race discrimination claim, the jury awarded $300,000 in compensatory and $700,000 in punitive damages. Equitable filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The court ordered a new trial on the race discrimination claim unless Christensen agreed in a

reduction of the award on that count to $75,000 in compensatory and $125,000 in punitive damages. Christensen accepted the reduction, and from the trial court's denial of judgment notwithstanding the verdict, Equitable filed a timely appeal to this court.[2]

II.

We consider first Equitable's appeal of the race discrimination claim. The standard for reviewing a trial court's action on a motion for judgment notwithstanding the verdict was recently stated by this court in *Tice v. Lampert Yards, Inc.*, No. 84-1325 (7th Cir. May 6, 1985). In that case, we stated that "[t]he standard . . . is whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in a light most favorable to the party against whom the motion is directed." Slip opinion at 4; see also *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Freeman v. Franzen*, 695 F.2d 485, 488 (7th Cir. 1982).

A careful review of the record establishes that there was not sufficient evidence, when so viewed, from which the jury might have found that Christensen was the victim of race discrimination. Christensen's contention is that Equitable is what the District of Columbia Circuit has called "that unusual employer who discriminates against the majority." *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981). The trial court properly

[2] Christensen argues that Equitable's appeal on the age discrimination claim is time-barred, since an order the court entered in March correcting a clerical error in an earlier order of judgment in January affected only the judgment on the race discrimination claim. In Christensen's view, the January order acted as a final judgment on the age discrimination claim, and Equitable's notice of appeal, filed in April, was untimely with respect to this claim. This bifurcated approach to finality is precluded by Fed. R. Civ. P. 54(b), which states that a partial resolution of a case leaving some claims unresolved is not a final judgment.

held, as did the *Parker* court, that plaintiff should nevertheless have the opportunity of demonstrating that his treatment met the conditions for employment discrimination outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *General Building Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375 (1982), and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), although those opinions were written in terms of discrimination against the minority. See Parker, supra, at 1017. We further agree that the choice Christensen's employer gave him between transfer to Chicago and termination constituted constructive discharge and that Christensen made out a *prima facie* case of discrimination. The record establishes, however, that Equitable rebutted this presumption by articulating legitimate, nondiscriminatory reasons for the action. *McDonnell Douglas*, *supra*, at 802; see also *Burdine*, *supra*, at 252-59. Equitable showed that it considered Christensen only marginally qualified for the very important position he held, and that it wished to replace him with someone it regarded as far better qualified. While the criteria on which it relied in making this determination may have been somewhat subjective, the criteria for evaluating executive personnel in a major corporation are necessarily subjective.

Christensen utterly failed to meet the burden which shifted to him, once Equitable showed a nonpretextual reason for its action, of "demonstrat[ing] that the proffered reason was not the true reason for the employment decision." *Burdine*, *supra*, at 256. The only evidence of discriminatory intent which Christensen was able to offer was the fact that Equitable has an affirmative action program which seeks to recruit black employees for executive positions. But, as the Parker court noted, a lawful affirmative action program is not evidence of discrimination against the majority. *Parker*, *supra*, at 1017 n.9. National policy permits the use of voluntary

affirmative action programs to remedy the legacy of discrimination. For the courts to discourage the use of such programs by treating them as evidence in themselves of the very discrimination they are designed to eradicate would be improper. The fact that Equitable had such a program is not evidence of discrimination.

Christensen failed to present any probative evidence that he was fired for racially discriminatory reasons and not for the legitimate reasons proffered by his employer. He thus failed to sustain his "ultimate burden of [showing] that [he] has been the victim of intentional discrimination." *Burdine, supra*, at 256. The judgment in his favor on the racial discrimination claim, therefore, must be reversed.

Nor is there probative evidence that Equitable intentionally discriminated against Christensen because of his age. As has been noted, Equitable demonstrated a nonpretextual reason for its action. The most that Christensen was able to show in rebuttal was that his early disassociation from the company had a negative impact on the size of his pension. In the absence of any showing that Equitable has a policy of terminating older employees in order to save on pension payments, Christensen's evidence fell far short of the substantial character needed to establish purposeful age discrimination. Therefore, we reverse on this count as well.

III.

The judgment of the district court is reversed and the cause is remanded for the entry of judgment for the defendant. No attorneys' fees are awarded, and each party will bear its own costs on appeal.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THEODORE D. CHRISTENSEN,	)	
	)	
Plaintiff	)	
	)	
v.	)	NO. IP 82-1797
	)	
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)	
	)	
Defendant.	)	

ORDER

This matter came on for hearing on defendant's motion for a judgment notwithstanding the verdict, or alternatively, for a new trial on the grounds that the damages awarded by the jury verdict were excessive. This Court has carefully considered the memoranda of law submitted by counsel and has heard oral argument. This Court now orders the following:

1. The parties stipulated during trial that, if liability were found on Count I of the complaint (alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §623(a)(1)), the parties would stipulate to the amount of damages. The jury was instructed in this regard and returned a verdict finding liability on Count I. The parties have stipulated to damages on Count I as follows: $62,000 in lost wages, and joint and

survivor pension benefits payable at a rate of $1457.80 per month, commencing on July 1, 1984. At age 65, the pension benefits shall be reduced to the sum of $1032.86 per month. Judgment shall be entered on Count I accordingly.

2. The jury found liability on Count II of the complaint (alleging race discrimination under 42 U.S.C. §1981) and awarded plaintiff $300,000 in compensatory damages and $700,000 in punitive damages. This Court has carefully examined the evidence at trial on the issue of damages and finds this jury award of one million dollars excessive, unreasonable and unsupported by the record. Accordingly, this Court believes that a remittitur, or in the alternative, a new trial is necessary. This Court, therefore, orders that unless plaintiff files a stipulation consenting to the reduction of the verdict on Count II to $75,000 compensatory damages and $125,000 punitive damages, and take judgment for that amount plus costs, a new trial will, and hereby is, granted to the defendant.

3. This Court orders that said stipulation is to be filed on or before January 30, 1984, or a new trial will be granted to defendant.

SO ORDERED.

Enter: _____

_____

Robert A. Grant
Senior District Judge

JUDGMENT — ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 10, 1985.

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. RICHARD A. POSNER, *Circuit Judge*

HON. JOHN W. PECK, *Senior Circuit Judge**

THEODORE D. CHRISTENSEN *Plaintiff-Appellee,* No. 84-1565 vs. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Defendant-Appellant.*	) Appeal from the) United States) District Court) for the Southern) District of) Indiana,) Indianapolis) Division.)) No. 82-C-1797) Robert A. Grant, *Judge.*

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said

* Hon. John W. Peck of the Sixth Circuit, sitting by designation.

District Court in this cause appealed from be, and the same is hereby, REVERSED, with no attorney's fees awarded, and each party to bear its own costs on appeal, and the cause is REMANDED, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 29, 1985.

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. RICHARD A. POSNER, *Circuit Judge*

HON. JOHN W. PECK, *Senior Circuit Judge**

THEODORE D. CHRISTENSEN *Plaintiff-Appellee,* No. 84-1565 vs. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Defendant-Appellant.*	) Appeal from the) United States) District Court) for the Southern) District of) Indiana,) Indianapolis) Division.)) No. 82-C-1797) Robert A. Grant, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiff-Appellee Theodore D. Christensen, no judge in active service has requested a vote thereon, and all

* The Honorable John W. Peck, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the foregoing petition for rehearing be, and the same is hereby, DENIED.